88-407

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HENRY VANCE - - - - - - **Petitioner**

versus

UNITED STATES OF AMERICA - - **Respondent**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. What is the proper standard of appellate review for district court orders entered pursuant to the Bail Reform Act of 1984, 18 U.S.C. §§ 3141 *et seq.*—the "clearly erroneous" standard of the Second and Fourth Circuit; the "independent review" standard used in the Third, Seventh, Eighth, Ninth and Eleventh Circuits; or the "supported by the proceedings below" standard of the First and Fifth Circuit?

2. Did Petitioner Vance prove by clear and convincing evidence that he would not pose a danger to the community or any person if released on bail pending appeal where his presentence investigation report revealed no prior criminal history, continuous employment, substantial ties to the community, and timely appearance at all court proceedings?

3. Was the petitioner's Fifth Amendment due process right to a meaningful post-conviction detention hearing denied where the Sixth Circuit implicitly conceded in its final opinion that the petitioner had not had a sufficient detention hearing, but, in contradiction to that conclusion, held that petitioner had not presented sufficient evidence at the insufficient hearing?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HENRY VANCE - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Henry Vance respectfully requests that a Writ of Certiorari issue to review the judgment and opinion on Petition for Rehearing of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The published opinion of the Sixth Circuit Court of Appeals reversing the decision of the district court for the Eastern District of Kentucky to grant the petitioner bail pending appeal, entered on July 8, 1988, on petitioner's petition for rehearing, is attached as Appendix A. The unpublished order of the Sixth Circuit of Appeals of the same date denying the motion of the petitioner to recall the mandate issued on the initial unpublished order of the Sixth Circuit similarly reversing the above-mentioned district court bail de-

cision is attached as Appendix B. The initial unpublished order of the Sixth Circuit entered on February 23, 1988 reversing the decision of the district court to grant the petitioner bail pending appeal of his conviction, is attached as Appendix C. The excerpt of the further district court proceedings held on March 3, 1988 pursuant to the unpublished Sixth Circuit order of February 23, 1988 is attached as Appendix D.

JURISDICTION

The published opinion of the Sixth Circuit Court of Appeals reversing the decision of the district court to grant the petitioner bail pending appeal was entered on July 8, 1988, on the timely petition for rehearing filed by the petitioner on March 2, 1988, eight days after the unpublished opinion of the Sixth Circuit to the same effect was entered on February 23, 1988. This petition for certiorari is within sixty days of July 8, 1988, as required by Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the Constitution of the United States

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life

or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, § 3143(b)

(b) Release or detention pending appeal by the defendant. — The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless judicial officer finds —

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

Title 18, United States Code, § 3142(g)

(g) Factors to be considered. — The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning —

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including —

(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

STATEMENT OF THE CASE

This is a petition for a review of a published opinion of the Sixth Circuit Court of Appeals reversing the decision of the district court to grant the petitioner release on bail pending appeal of his conviction. Petitioner Vance was convicted after a jury trial in the Eastern District of Kentucky of one count of conspiracy, 18 U.S.C. § 371, and one count of aiding in the transportation of a firearm in interstate commerce to commit a felony, 18 U.S.C. §924(b). These charges were brought in a two count indictment that charged

the petitioner in count one with conspiring to bring about the death of a Florida Assistant State Attorney, and, in count two, with providing the weapon used by an unindicted co-conspirator to commit the mudred.[1]

Petitioner voluntarily appeared in Lexington, Kentucky for arraignment on these charges on January 16, 1987. At the time, petitioner was forty-five years old, a married professional man with two daughters and a life-long resident of Lexington, Kentucky. Petitioner had no record of prior felony convictions nor of arrests. Upon his appearance, the district court permitted the petitioner to remain at liberty on a non-surety bond of $10,000. The court's order of pretrial release also permitted the petitioner to travel without restriction within Kentucky, and to Florida, the scene of the crime, with the prior approval of the United States Probation Office.

No objection to or appeal from this order was made by the United States. Nor did the United States request a pretrial detention hearing based on the potential for danger posed by the petitioner's pretrial release. Nine months then followed. During this time, the district court held five separate proceedings on various pretrial motions and evidentiary matters. [Appendix D, p. 16a.] No questions were raised concerning the petitioner's pretrial release. In fact, the petitioner was permitted to travel to Washington, D.C.,

[1]Because this petition of necessity centers on the proceedings and evidence related to the bail decisions of the district court, the evidence presented at trial will be discussed only to the extent it bears on the bail decision of the Sixth Circuit Court of Appeals.

on the order of the district court with the approval of the government.

Trial was subsequently held in Ashland, Kentucky from October 20, to October 29, 1987. At trial, the primary witness for the prosecution was Bonnie Kelly, an unindicted co-conspirator then serving a life sentence of imprisonment for her role in the murder. In essence, Kelly testified that she and the petitioner, at her husband's request, conspired in January of 1982 to murder Florida prosecutor, Eugene Berry. According to Kelly, on January 16, 1982 she shot Berry three times using a handgun allegedly provided to her by the petitioner the day before the shooting. At trial, over the petitioner's objection, Kelly also testified extensively to certain acts of uncharged prior misconduct supposedly committed by the petitioner in the early 1970's. Kelly's testimony in both instances was the only testimony directly linking the petitioner to the charged offenses or the prior uncharged misconduct.[2]

At the conclusion of trial on October 29, 1987 petitioner was convicted on both counts. As before, the district court ordered that the petitioner remain at liberty pending sentencing, with an appearance bond of $50,000 in real property being posted as security. Sentencing then followed on November 20, 1988. At the sentencing hearing, the government for the first time challenged the petitioner's continued release on

[2]Admission of this uncharged misconduct is the basis for petitioner's direct appeal now pending before the Sixth Circuit in *United States* v. *Henry Vance,* Case No. 87-6276.

the sole ground that the petitioner presented a danger to other persons or the community if released on bail pending appeal. The district court summarily rejected this argument, noting that, "I don't see in the presentence report any evidence of any violence on the part of this man." Only the petitioner's presentence report and attached letters were considered by the district court. No other evidence or testimony by any party was then given although the petitioner then had witnesses present and willing to testify to his peaceful nature.

On December 18, 1987, the United States appealed the order granting petitioner bail pending appeal and filed a motion to expedite in which it argued that the petitioner had failed to establish by clear and convincing evidence that he was not a danger to others or to the community. Both parties then filed briefs debating the proper standard of appellate review and the adequacy of proof on the issue of dangerousness. After briefing, the Sixth Circuit entered a short unpublished order on February 23, 1988, which held that the "defendant has failed to establish an element necessary for bail pending appeal." [Appendix C, p. 14a.] The order then granted the government's motion to detain and remanded the appeal "for proceedings consistent with this order." Timely petition for rehearing and motion to recall the mandate were filed on March 2, 1988. The following day, on March 3, 1988, the district court held further proceedings pursuant to the February 23, 1988 order.

These proceedings consisted of an extended hearing during which the district court observed that it had never "before been led to believe that it was the United States' position that the defendant was a quote [sic], 'threat to the community,' end quote [sic]. And I was really blind-sided." [Appendix D, p. 16a.] The court then set out in detail the entire procedural history of the case concluding that ". . . I can say right here and now, I don't feel threatened by the man." [Appendix D, p. 20a.] However, because the district court concluded that no jurisdiction existed to hear further evidence on the issue of dangerousness, it ordered that the petitioner voluntarily surrender on March 21, 1988. The petitioner then filed a motion with the Sixth Circuit to supplement the record on appeal with a transcript of the hearing and filed a supplement to his petition for rehearing, based on the district court's comments.

On March 18, 1988, the Sixth Circuit informally ordered oral argument on the petition for rehearing. Petitioner immediately filed a successful motion in district court for the court to stay its voluntary surrender order pending the outcome of his petition for rehearing. No appeal from the order staying surrender was taken by the government. Oral arguments on the petition for rehearing were held on March 30, 1988. On July 8, 1988, the Sixth Circuit entered the published opinion and order from which the petitioner now seeks review by petition for certiorari. [Appendix A.] As before, the Sixth Circuit concluded in its

opinion that the petitioner had failed to establish by clear and convincing evidence that if released on bail pending appeal he would not present a danger to any other person or the community.

REASONS FOR GRANTING THE WRIT

I.

The Present Petition for Certiorari Should be Granted to Resolve the Split Among the Federal Circuit Courts on the Proper Standard of Appellate Review to be Applied to District Court Orders Entered Pursuant to the Bail Reform Act of 1984, 18 U.S.C. §§ 3141 *et seq.*

In its published opinion of July 8, 1988, the Sixth Circuit specifically declined to state the standard of review it applied in reversing the decision of the district court to grant petitioner Vance release on bail pending appeal. [Appendix A, p. 10a.] This issue, the proper standard of appellate review in bail appeals, has markedly divided the federal courts. *See, United States* v. *Portes,* 786 F. 2d 758, 762 (7th Cir. 1986); *United States* v. *Hurtado,* 779 F. 2d 1467, 1471 (4th Cir. 1985); *United States* v. *Maull,* 773 F. 2d 1479, 1486-87 (8th Cir. 1985). In the present case, the United States urged the Sixth Circuit to adopt the "independent review" standard now applied in the Third, Seventh, Eighth, Ninth and Eleventh Circuits. *E.g. United States* v. *Delker,* 757 F. 2d 1390, 1399-1400 (3rd Cir. 1985); *United States* v. *Portes,* 786 F. 2d at 762 (7th Cir. 1986); *United States* v. *Maull,* 773 F. 2d at 1486-87 (8th Cir. 1985); *United States* v. *Montamedi,*

767 F. 2d 1403, 1406 (9th Cir. 1985). The petitioner in response urged that the "clearly erroneous'" standard applied in the Second and Fourth Circuit be adopted by the Sixth Circuit.[3] *See, United States* v. *Chimurenga,* 760 F. 2d 400, 405 (2nd Cir. 1985); *United States* v. *Williams,* 753 F. 2d 329, 333 (4th Cir. 1985). No published opinion of the Sixth Circuit establishes the proper standard of appellate review in post-conviction bail proceedings. Cf. *United States* v. *Hazime,* 762 F. 2d 34, 36-37 (6th Cir. 1985) (adopting in the pretrial bail context a clearly erroneous standard of appellate bail review to purely factual findings, and an independent review standard for mixed questions of law and fact). Petitioner in his brief, his petition for rehearing and his supplemental petition for rehearing urged the circuit court to clarify its position; the Sixth Circuit declined.

The refusal of the Sixth Circuit to face this question is particularly unfortunate. A uniform standard of appellate review is critical in bail proceedings. Bail decisions of necessity involve the most fundamental of Fifth Amendment rights, the protection from deprivation of liberty without due process of law. Each year literally thousands pre- and post-trial detainees file bail appeals in the federal district and circuit courts. As the matter presently stands, the outcome of these

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[3]The third standard of appellate review, the "supported by the proceedings below" standard used early on by the First and Fifth Circuit was not at issue. *See, United States* v. *Jessup,* 757 F. 2d 378, 387-88 (1st Cir. 1985); *United States* v. *Fortna,* 769 F. 2d 243, 250 (5th Cir. 1985).

appeals may well depend on the fortuitous (or unfortuitous) circumstance of the federal circuit in which the detainee finds himself. Clearly there is a need for further clarification on this point. A decision by this Court would have an immediate national impact far beyond the circumstances of this petition by ensuring a uniform standard of review for all bail appeals.

Petitioner respectfully submits that even within the confines of his case the selection of a specific standard of appellate review would have resulted in a completely different outcome on appeal. Factual findings regarding the likelihood of flight or dangerousness should be accorded the deference of a clearly erroneous review. *See, United States* v. *Hurtado,* 779 F. 2d at 1472 n.5. The district court specifically found, based on the petitioner's presentence investigation report that "I don't see in the presentence report any evidence of violence on the part of this man." [Transcript of the sentencing hearing of November 20, 1987, p. 24.] Later, at the district court hearing of March 3, 1988 the district court again emphatically stated, "But I can say right here and now, I don't feel threatened by the man." [Appendix D, p. 20a.] Had these findings and the petitioner's spotless record of lawfulness and employment been given the deference of a clearly erroneous standard of appellate review, petitioner respectfully submits that he would be at liberty today.

Because however the Sixth Circuit declined to establish a specific standard of appellate review, the findings of the district court were not given the defer-

ence to which they were entitled and the district court's decision was improperly reversed.

II.

The Present Petition for Certiorari Should be Granted to Further Clarify the Concept of Dangerous Under the Post-Conviction Section of the Bail Reform Act, 18 U.S.C. § 3141 *et seq.* and Because the Petitioner Clearly and Convincing Established His Lack of Dangerousness If Released on Bail Pending Appeal.

In its decision of July 8, 1988, the Sixth Circuit held that the petitioner ". . . had failed to carry his burden under the Bail Reform Act [of providing his lack of dangerousness by clear and convincing evidence.] [Appendix A, p. 14a.] This concept, dangerousness to the safety of any person or the community, is an amorphous condition of release pending appeal that is not defined by the language of 18 U.S.C. § 3143(b). At best, the pretrial detention section of the Bail Reform Act, 18 U.S.C. § 3142(g), provides a brief list of available information to be taken into account in pretrial release decisions, including: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3) the history and characteristics of the person; (4) the nature and seriousness of the danger to any person or the community posed by the person's release. 18 U.S.C. § 3141; *See United States* v. *Delker*, 757 F. 2d at 1393, 1398-99.

Very little judicial interpretation of this condition of release is to be found in the published opinions of the federal courts. Most recently, this Court in *United*

States v. *Salerno*, 481 U.S. ——, 95 L. Ed. 2d 697, 107 S. Ct. —— (1987) began the judicial discussion on dangerousness as a ground for pretrial detention under § 3142 of Title 18. Beyond this starting point, however, little explicit discussion of dangerousness exists especially in the post-conviction setting.

Such a discussion would prove invaluable to the lower federal courts. District judges and their magistrates on a daily basis must determine who is or is not dangerous for the purpose of the Bail Reform Act. This decision is necessarily dependent on the complex circumstances of each defendant, but it need not be further complicated by the vacuum of caselaw defining the salient aspects of dangerousness.

In the present circumstances, this absence of guidance led the Sixth Circuit to erroneously reverse the bail decision of the district court. In so doing, the Sixth Circuit focused only on the nature of the alleged offense without properly considering the weight of the evidence and the history and characteristics of the petitioner. In this regard, petitioner earlier noted that he had no prior criminal record of any convictions or even of arrests at the time of his indictment. He had been continuously employed his entire adult life, serving in such important positions as aide to former Kentucky Governor Julian Carroll and Speaker of the House of the Kentucky legislature, Bobby Richardson. Throughout the entire course of the proceedings petitioner timely appeared at all court hearings. Most importantly, the United States made absolutely no at-

tempt whatsoever to detain him on grounds of public safety prior to his conviction on October 29, 1987. Finally, even the Sixth Circuit, which dismissed all the above factors in a brief footnote, was forced to concede that the testimony of the government's star witness, Bonnie Kelly was "vigorously contested" at trial [Appendix A, p. 10a.] Had the Sixth Circuit properly balanced these factors into its determination of dangerousness, the decision of the district court would not have been reversed. Petitioner is simply not the type of habitually violent persistent offender who is ordinarily denied bail pending appeal. *Cf. United States* v. *Bayko,* 774 F. 2d 516, 517 (1st Cir. 1985); *United States* v. *Delker,* 757 F. 2d at 1392; *United States* v. *Fonfrias,* 612 F. Supp. 999 (D.C. Puerto Rico 1985).

A thorough, analytical discussion of dangerousness by this Court is therefore needed to provide guidance to the federal courts in this evolving area of criminal jurisprudence and prevent injustices such as that visited on the petitioner .

III.

The Present Petition for Certiorari Should be Granted Because the Petitioner Was Denied His Fifth Amendment Due Process Right to a Meaningful Post-Conviction Bail Hearing as Confirmed by the Language of the Published Opinion of the Sixth Circuit Reversing the District Court Decision Granting Bail Pending Appeal.

At the district court hearing of March 3, 1988, held pursuant to the unpublished February 23, 1988 order of the Sixth Circuit [Appendix B], the district court

noted that prior to the petitioner's sentencing hearing of November 20, 1987, the question of dangerousness had never been raised by the United States. The district court further observed that on this issue it had cut the petitioner's trial counsel off at the sentencing hearing because the court anticipated that the post-conviction bail decision would turn on the issue of whether petitioner had raised a substantial question under part (2) or 18 U.S.C. § 3143(b). In the words of the district court.

> You see, the problem here is, is that on November 20th, this Court was not then, nor ever before, led to believe that it was the United States' position that the Defendant was a quote, "threat to the community", end quote. and I was really blind-sided.
>
> I really cut you off, Mr. Haddad, in the hearing because, because I really thought it was going to turn on the delay issue and substantial question issue that—that kicks in after sentencing, you see. So I really was not anticipating the action taken by the United States in this case; that is, going to the Sixth Circuit on the one issue of threat to the community.
>
> So I really cut you off, Mr. Haddad, at that hearing and we zeroed in—the transcript, I have reviewed the transcript of that hearing—it zeroed in on that issue of whether or not an appeal was just unnecessary delay; and there's just no question of a substantial nature. [Appendix D, p. 16a.]

In view of the language of the unpublished order of February 23, 1988, however, the district court con-

cluded that it had no jurisdiction to hold further evidentiary hearings. In this order, the Sixth Circuit stated in conclusion only that ". . . the government's motion to detain defendant is granted and this appeal is remanded to the district court for proceedings consistent with this order." [Appendix C, p. 14a.] No mention whatsoever was made in the February 23, 1988 order that the Sixth Circuit intended there be further evidentiary hearings beyond the abridged sentencing hearing of November 20, 1987.

At the outset of the published opinion of July 8, 1988 [Appendix A, p. 2a] the Sixth Circuit, however, characterized the February 23, 1988 order thusly,

> On February 23, 1988, we considered defendant's response and the record then before us and held that defendant had failed to establish an element necessary for bail pending appeal. *We remanded the matter to the district court for proceedings to determine whether Vance presented a danger to the safety of other persons or to the community.*

[Appendix A, p. 2a.] [Emphasis added.] The Sixth Circuit continued in the same opinion to add that "The district court was mistaken when it decided no detention hearing was required." [Appendix A, p. 5a.] As these comments obviously suggest, the Sixth Circuit intended that the petitioner and the district court not be "cut off" or "blind-sided," and that the petitioner be given a further opportunity to present evidence of his peaceful character beyond the presentence investigation report and letters presented at the No-

vember 20, 1987 sentencing hearing. However, without sufficient explanation, the Sixth Circuit continued to hold in its July 8, 1988 opinion that the petitioner had failed to present adequately clear and convincing evidence of his peacefulness *at the very hearing that it had just found to be insufficient.*

It is as inequitable as it is illogical, to criticize the district court for failing to hold an evidentiary hearing on the defendant's potential for dangerousness and then, in almost the same breath, hold that the petitioner failed to carry his burden of proof at a hearing which he never had. The Due Process Clause of the Fifth Amendment requires that the petitioner be afforded notice and opportunity for a meaningful hearing prior to the deprivation of his liberty. *See, Mathews* v. *Eldridge,* 424 U.S. 319 (1976). As the Fifth Circuit has noted, the Bill of Rights compels an evidentiary hearing prior to denying bail pending appeal. *Leary* v. *United States,* 431 F. 2d 95, 91 (5th Cir. 1970); *United States* v. *Disalvo,* 663 F. Supp. 142, 144 (E.D. Pa. 1985). The district court has acknowledged that it prevented the petitioner's counsel from adequately developing proof of the petitioner's peacefulness. The Sixth Circuit has indicated by its opinion of July 8, 1988 that it intended that the petitioner have a meaningful evidentiary hearing by its order of February 23, 1988. However, the Sixth Circuit, in irreconcilable fashion, then ordered the petitioner detained for failing to bear his burden of proof at a hearing which both courts acknowledged did not adequately address the

issue of the petitioner's propensity for dangerousness. Petitioner respectfully submits that a petition for a writ of certiorari should issue to protect his procedural due process rights and to clarify the otherwise irreconcilable opinion of July 8, 1988.

CONCLUSION

Accordingly, Petitioner Henry Vance respectfully requests that this court grant his Petition for Writ of Certiorari in order to resolve the proper standard of appellate review in bail appeals, to clarify the nature and elements of dangerousness under 18 U.S.C. § 3142 and 3143, and to correct an internally irreconcilable Sixth Circuit opinion that demonstrates on its face that the petitioner was denied procedural due process.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 87-6366

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant,*

v.

HENRY VANCE, - - - - - *Defendant-Appellee.*

On Appeal from the United States District Court for the Eastern District of Kentucky

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Decided and Filed July 8, 1988

Before: KEITH, WELLFORD and NELSON, Circuit Judges.

WELLFORD, Circuit Judge. In this case we consider a motion filed by the United States asking us to revoke the bond of the defendant Henry Vance. A jury has found Vance guilty on charges of conspiracy and aiding and abetting transportation of a weapon used to kill a state prosecutor in Florida. The district court denied defendant's motions for acquittal and for a new trial with regard to the jury's guilty verdict. It sentenced defendant to the maximum permitted term of fifteen years imprisonment on both counts under 18 U.S.C. § 4205(b)(2) plus a mandatory fine; but overruled the government's objection that Vance should not remain on bond following the conviction.[1] The government moved to expedite its appeal from the district court's

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[1]The district court allowed Vance to remain free on the same terms and conditions of the bond previously posted before the conviction.

order permitting Vance to remain free on bail, and sought an expedited order that defendant be detained pending his appeal from his conviction on the grounds that Vance "did not prove by clear and convincing evidence that he was not a danger to others or to the community." (Government's motion filed December 22, 1987, at 1.)

On February 23, 1988, we considered defendant's response and the record then before us and held that defendant had failed to establish an element necessary for bail pending appeal. We remanded the matter to the district court for proceedings to determine whether Vance presented a danger to the safety of other persons or to the community. A mandate issued with respect to this order. On March 3, 1988, the district court held a hearing and the United States Attorney took the position "that [the order] can only be interpreted that he should be detained right now." The defendant's counsel pointed out that he had filed a motion to recall and stay issuance of the mandate prior to the district court hearing. Defendant's counsel also filed a motion with the district court "to extend time to commence the sentence," and to permit defendant to report under voluntary surrender provisions, if bail were not continued.

The district court indicated that he had been at first prepared to enter an order on the government's motion to call upon Vance to surrender forthwith, but was disturbed that Vance's "imminent arrest and surrender" was made known to the media.[2] The district court indicated that at

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[2]Defendant's counsel and the district court also expressed surprise and concern that our mandate had issued less than 21 days after the February 23, 1988 order. *See* Rule 41(a) of the Rules of Appellate Procedure. The language of that rule expressly provides, however, that "the mandate . . . shall issue 21 days after the entry of judgment *unless the time is shortened* or enlarged by order." (Emphasis added).

the time of sentencing the government had not taken the position that defendant was a "threat to the community." We believe the record at the time of sentencing indicates clearly that the district judge was mistaken about this impression. The government made its position known plainly that in its view Vance was a danger and a threat:

> MS. EDELMAN: Your Honor, we strongly object to Mr. Vance being permitted to continue on his bond pending appeal. I believe that the law is very clear that at this stage of the proceeding Mr. Vance is required, he has the burden to make a showing of the various provisions that are set forth in Title 18, U.S. Code, Section 3143. And at this time we would think if he's going to request to continue on any type of bond pending appeal that he has to meet that very heavy burden which I would submit to the Court, I don't even believe this is really possible in view of the offense that he's been convicted of in and of itself is obviously a very dangerous offense. I think his background and other matters that he was involved in indicates his dangerousness.
>
> I think that there has been evidence introduced here during the trial of this case which certainly suggests his use of aliases which would certainly aid his ability to leave the country if he were to choose to do such a thing and to not reappear. * * * *
>
> I strongly urge the Court to consider the fact that we do believe Mr. Vance is dangerous. The offense that he has committed is frightening. I think that there's been a great deal of people — a lot of people concerned who do not understand the court system, that do not understand how someone such as Mr. Vance having standed convicted of what he's convicted of

> could possibly still be mixing and mingling in this community.
>
> I strongly urge the Court to not permit him to remain out on bond pending appeal. I just don't think this is the appropriate type of case. Obviously Mr. Vance lives in Lexington where others of us also live. It makes me uncomfortable to know that Mr. Vance is mixing and mingling in Lexington, Kentucky; . . .

Transcript of Hearing, November 20, 1987, at 16, 17, 18.

At this same hearing, defendant's counsel pointed to the presentence report and letters from persons in the community that had been submitted to the district judge[3] to argue that Vance posed "no danger whatsoever to the safety of any other person or to the community at large." The prosecutor responded:

> [I]t's the defendant's burden and Mr. Haddad [defendant's attorney] is merely just making statements that they have shown by clear and convincing evidence that he is not a danger to the community. I don't see any evidence in this record that indicates such, and it is his burden to meet that test. And absent some showing on his part of why he's not a danger in view of what he's been convicted of, I just don't believe they've even attempted to adress that burden much less meet it by clear and convincing evidence.

Id. at 23.

We find that the prosecutor was correct in her assessment of the evidentiary burdens at that point. 18 U.S.C. § 3143(a) supports the position of the United States that

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[3]At the sentencing hearing the prosecutor complained that she had no prior opportunity to examine these letters.

defendant must present "clear and convincing evidence" that he does not "pose a danger to the safety of any other person or the community" after conviction.

Title 18, U.S.C. § 3143(a) provides:

> (a) *Release or detention pending sentence.* — The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c). If the judicial officer makes such a finding, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

Section (b) of that same provision sets out the same burden upon the convicted defendant who "has filed an appeal" from his conviction, as has Mr. Vance.

The district court was mistaken when it decided no detention hearing was required. We have already indicated that the statute does not require the government to make an initial showing of dangerousness. Rather, it presumes dangerousness and the criminal defendant must overcome this presumption. In any event, the government did make dangerousness an issue. We also do not believe the evidence before the court warranted bail. The court clearly considered several letters written on Vance's behalf in deciding detention was not necessary.[4] The district court had, prior to the bail hearing, overruled the defendant's request to make the letters submitted on his behalf a part

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[4]In pronouncing sentence, the district judge did indicate that it had taken into account the presentence report and the letters in question.

of the presentence report. They were not then a part of the record, and the government had not had an opportunity to review them. The district court did state that it would hold the letters in its possession and then release them with the presentence report at a later time unless the government objected by five o'clock that afternoon. We doubt that the letters submitted to the district judge in this case should be considered as evidence since they were not made a part of the record at the time he made his bail decision. If considered to be evidence to support defendant's burden under § 3143, the government should have an adequate opportunity to consider it and to counter or rebut it if deemed necessary. That opportunity was lacking in this case. Many of the letters are from close family members or relatives, and most deal with circumstances which are evident in the presentence report. Many reflect the respect with which defendant's family is held in the Lexington community, or the particular writer's opinion that Vance is not guilty of the offense charged. Even if considered, and we have read this material, we would find release of Vance unwarranted.

The decision not to detain Vance contradicts the evidence of dangerousness shown at trial. At the time of sentencing the court made the following observations:

> And I thought during the trial you [Vance] had to have been warned about those people. But when I hear the evidence and apply the reasonable inferences, for reasons known only to yourself, the evidence was overwhelming in my judgment of your guilt. It was a serious offense. . . .
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> * * *
>
> I will go to my grave wondering why you [Vance] would—number one, why you would get involved with all these people over these years to being with;

. . . .

> I can't understand it. It was a senseless murder, a senseless murder. And I realize that then and now you maintain your innocence. The jury found you guilty of giving Bonnie Kelly a .38 revolver to take from Lexington, Kentucky to the State of Florida and blow a man out into eternity because . . . because . . . I don't know. Probably vengeance. How do those people think?

Sentencing Transcript at 13, 14.

Vance was indicted for being a conspirator and for abetting Bonnie Kelly in transporting a gun from Kentucky, the vicinity of Vance's home, and Florida, where Kelly used the gun to kill a state prosecutor. The government's proof showed association over a period of time between Vance, a man of some prominence in the Lexington area, and with Bonnie Kelly and her husband, Mike, involved with dealing in weapons. The district court permitted evidence concerning alleged criminal activity of defendant and/or his associates prior to the indictment offense, including activity while Vance was a deputy sheriff. Mike Kelly was indicted and later jailed in Florida for drug smuggling, and he was prosecuted by the victim shot by his wife, Bonnie Kelly. The government's proof came principally from Bonnie Kelly, and much of her testimony was vigorously contested by defendant's witnesses. The nature of the charges against Vance were very serious, and allegedly interrelated with his activities was a brutal premeditated murder. The district court obviously considered this to be a very serious offense in reaching the decision to impose a maximum sentence.

In *United States* v. *Hazime*, 762 F. 2d 34 (6th Cir 1985), we considered a decision denying bail prior to trial, and cited, among other decisions, *United States v. Jessup*, 757

F. 2d 378 (1st Cir. 1985). *Jessup* involved another subsection of the Bail Reform Act but had occasion to discuss the section which is of concern here:

> Congress knew how to create a 'burden of persuasion' when it wanted to do so. Section 3143 creates a presumption that a defendant who has been convicted of a crime may not be released pending his appeal or sentencing unless he shows "by clear and convincing evidence that [he] is not likely to flee or pose a danger to the safety of any other person or the community."
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> . . . The Judiciary Committee Report notes that
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> > The Committee intends that in overcoming the presumption in favor of detention [in § 3143] *the burden of proof* rests with the defendant.
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> S. Rep., *supra*, at 27 (emphasis added), 1984 U.S. Code Cong. & Admin. News, p. 30.

757 F. 2d at 382.

We have held that the Bail Reform Act is constitutional in respect to casting a burden upon defendants to justify release on bail following conviction. *United States* v. *Pollard*, 778 F. 2d 1177 (6th Cir. 1985). Following his conviction, then, defendant Vance has the burden of showing, among other things, that he is not a danger to any other person or to the community. *See United States* v. *Wheeler*, 795 F. 2d 839, 840 (9th Cir. 1986). In dealing with the danger to the community or other person concept, the courts look to more than whether or not defendant *himself* has been guilty of physical violence:

> The legislative history also specifies that the concept of a defendant's dangerousness as used in the Act it to "be given a broader construction than merely danger of harm involving physical violence." *Id.* at

> 12-13 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News at 15 (Supp. 9A). (In so doing, the Senate Report cites to the opinion of this Court in *United States* v. *Provenzano*, 605 F. 2d 85 (3d Cir. 1979)). The Congress was apparently concerned with the safety not only "of a particular identifiable individual, perhaps a victim or witness," but also of the community as a whole. *Id.*
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> * * *
>
> In ascertaining whether to detain or release a defendant, the judicial officer is directed by the statute to consider the available information concerning several factors, including: (1) the nature and seriousness of the offense charged; (2) the weight of evidence against the defendant; (3) the defendant's character, physical and mental condition, family and community ties, past conduct, history relating to drug or alcohol abuse, and criminal history; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.

United States v. *Delker*, 757 Fed. 1390, 1393, 1398-99 (3d Cir. 1985).

The district court commented at sentencing upon the nature of this offense, its seriousness and the overwhelming indication of guilt if the government's witnesses were believed. Evidence at trial, although contested, bore upon Vance's past history and his association with criminals and his connection with guns. All these circumstances would compel denial of bond after conviction, especially when the government counsel herself expressed apprehension about Vance as a potential threat. No testimonial evidence was presented by Vance at the hearing concerning bail. He and his counsel relied first and foremost upon the presentence

report information. We have independently examined the presentence report and find a lack of clear and convincing evidence within its fourteen pages, plus ten pages of "sentencing data," taking the information as a whole, that would direct the judicial officer to release Vance.[5] Whether we adopt a "clearly erroneous" standard of review or use an abuse of discretion approach, defendant has simply failed to carry his burden as to the requirements of § 3143 in this case.

After conviction of the serious type of crime involved here, we find the action of the district court to have been erroneous in granting Vance bond, and in continuing Vance on bond after our prior order reflecting our view that Vance had failed to carry his burden under the Bail Reform Act. We approve the language of Judge Bue as applicable in this situation:

> [I]n enacting section 3143 of the Bail Reform Act of 1984, the committee endeavored to eliminate the presumption in favor of bail, and to create a presumption against post conviction release. As stated in the committee report:
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> > Once guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.
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> S. Rep. No. 225, 98th Cong., 1st Sess. 26 (1983), *reprinted* in 1984 U. S. Code Cong. & Ad. News 3182,

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[5]The sentencing data in the presentence report included "defendant's version of the circumstances." He conforms his uncertainty about a crucial date with respect to an alibi for Mrs. Kelly. Vance had no prior criminal record and has a continuous work history, including work in the political arena.

3209; *United States* v. *Giancola*, 754 F. 2d 898 (11th Cir. 1985).

United States v. *Farran*, 611 F. Supp. 602, 603 (S.D. Tex. 1985), *aff'd without opinion*, 784 F. 2d 1111 (5th Cir.), *cert. denied*, 476 U.S. 1144 (1986).

Accordingly, we deny defendant's motion to recall the prior mandate, and we grant the motion of the United States to order the defendant to be detained pending appeal, and the motion to expedite the appeal on the merits of the conviction. We, of course, express no view on the merits of the appeal. This matter is REMANDED to the district court to enter the appropriate order promptly in conformity herewith.

APPENDIX B

FOR THE SIXTH CIRCUIT

UNITED STATES COURT OF APPEALS

No. 87-6366

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant,*

v.

HENRY VANCE, - - - - - *Defendant-Appellee.*

ORDER—Filed July 11, 1988

Before: KEITH, WELLFORD and NELSON, Circuit Judges.

Upon consideration whereof, IT IS ORDERED and adjudged that the motion to recall the mandate of February 28, 1988 is denied, the motion to have the defendant detained pending further appeal to the United States Supreme Court is granted and the motion to expedite the appeal on the merits of the conviction has been granted and the matter has been heard.

IT IS FURTHER ORDERED that this case is remanded to the district court for appropriate action promptly in conformity herewith. No costs taxed.

Entered by Order of the Court

(s) Leonard Green
Leonard Green
Clerk

APPENDIX C

No. 87-6366

FOR THE SIXTH CIRCUIT

UNITED STATES COURT OF APPEALS

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant,*

v.

HENRY VANCE, - - - - - *Defendant-Appellee.*

ORDER—Filed February 23, 1988

Before: KEITH, WELLFORD and NELSON, Circuit Judges.

The government has appealed from the district court's order which granted defendant's motion for bail pending appeal from his convictions for conspiracy and aiding and abetting in transporting a weapon arcoss state lines for the purpose of killing a Florida state prosecutor. Appellant moves for an order to detain defendant and to expedite this appeal.

The standards for release pending appeal are found in 18 U.S.C. § 3143 and *United States* v. *Pollard*, 778 F. 2d 1177 (6th Cir. 1985). A convicted person shall be detained unless the court finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released and that the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial. A finding against defendant on any of those four criteria requires the court to order for a new trial. A finding against defendant on any of

these four criteria requires the court to order defendant detained.

The district court found that defendant did not pose a risk of flight, did not pose a danger to the safety of other persons or the community, that the appeal was not for purposes of delay and that the appeal raised a substantial issue concerning the admission of certain "prior bad acts" evidence that was likely to result in reversal or an order for a new trial. The government does not contest the findings as to risk of flight or delay, but contends that defendant does pose a danger to the safety of other persons and to the community at large. A review of the record leads the court to conclude that the defendant has failed to meet his burden of establishing by clear and convincing evidence that he does not pose a danger to the safety of other persons or to the community. The crimes for which defendant was convicted are clearly violent in nature and the record is replete with evidence that defendant has engaged in a series of illegal activities over the past several years. The evidence he adduced at trial and at the hearing on his motion for release pending appeal neither rises to the level of clear and convincing evidence so as to overcome the reasonable conclusions to be drawn from a review of the record nor overcomes the statutory presumption of detention on this issue.

We need not decide whether appeal raises a substantial issue likely to result in reversal or an order for a new trial, because we conclude that defendant has failed to establish an element necessary for bail pending appeal. In conclusion, the government's motion to detain defendant is granted and this appeal is remanded to the district court for proceedings consistent with this order. The motion to expedite this appeal is denied as moot.

It is so ORDERED.

Entered by Order of the Court

(s) John P. Hehman
Clerk

APPENDIX D

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Well, in conformity with the Court's Order of February 23rd, and consistent with those proceedings, let me—

You see, the problem here is, is that on November 20th, this Court was not then, nor ever before, led to believe that it was the United States' position that the Defendant was a, quote, "threat to the community", end quote. And I was really blind-sided.

I really cut you off, Mr. Haddad, in the hearing because, because I really thought it was going to turn on the delay issue and substantial question issue that is—that kicks in after sentencing, you see. So I really was not anticipating the action taken by the United States in this case; that is, going to the 6th Circuit on the one issue of threat to the community.

So I really cut you off, Mr. Haddad, at that hearing and we zeroed in—the transcript, I have reviewed the transcript of that hearing—it zeroed in on that issue of whether or not an appeal was just unnecessary delay; and there's just no question of a substantial nature.

I think the record should reflect at this time that I presided at Mr. Vance's arraignment on January 16, 1987. Mr. Vance appeared on a Summons, on a Summons. $10,000 unsecured bond was set and met. And the United States had on objection to Mr. Vance traveling to Florida; where, as I found out later during the trial, if anyone was going to feel

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threatened by Mr. Vance, they resided in Florida. But the United States did not alert the Court of any possible threat, you know. They should have brought this up at the very—at the very outset and so we could have had a detention hearing, full-blown hearing.

I do recall—and I think the minutes will reflect—that the only thing that the United States even came close to apprising the Court was, a threat of flight. They asked that he surrender his passport.

Is that not correct, Mr. Reinhardt?

Mr. Reinhardt: That's correct, Your Honor?

The Court: Did he not surrender his passport

Mr. Reinhardt: At the initial proceedings.

The Court: Very well; thank you.

So no detention hearing was required because the United States did not alert the Court to the fact that Mr. Vance was a threat to the community.

On February 27, 1987 I conducted a discovery conference; Mr. Vance was present. The Court was not alerted to the fact that Mr. Vance was a threat to flight or a threat to the community.

On March 27, 1987 I conducted a Starks hearing. Mr. Vance was present. The United States did not alert the Court that Mr. Vance was a threat to flight or a threat to the community.

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On June 26, 1987 I held a pre-trial conference here in Lexington, but, because of prior Orders, Mr. Vance was not present. The issue of threat or flight was not raised.

On July 27, 1987 I ordered that Mr. Vance could go to Washington, D. C. with prior notice to the Probation Office, and the Government agreed to it without alerting the Court that Mr. Vance might be a threat to the president of the United States or some other Federal officer, or just anybody in Washington, D. C.

On September 18, 1987 I conducted a hearing to divulge information on pending motions and Mr. Vance was not present at that hearing but he was not required by the Court to be present at that time.

On October 20th the trial commenced; it concluded on October 29th. Mr. Vance, of course, was present at the trial.

At the conclusion of the trial, the motion—the United States made its first motion for detention. And they said he—Well, it was—only the first two factors apply to post-conviction, pre-sentencing; that is, whether or not he is a threat—a risk of flight or a threat to the community.

I distinctly remember telling Mrs. Edelman, "I do not believe that he is a risk of flight; I do not believe that he poses a threat to the community," And I told her, I said, "Now after the sentencing, there is another factor that kicks

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"in; and, that is, whether or not this would be just for the purposes of delay and appeal, yon know, whether or not there was any substantial question that might result in a reversal." I said, "You may have something there. But right now, I do not—I find that he is not a risk to flight. I find that he is not a threat to the community."

The United States did not appeal my findings that I delivered from the bench on October 29, 1987.

On November 20, 1987 I conducted a sentencing proceeding here in Lexington. Mr. Vance was present and the United States again renewed its motion for detention pending appeal.

Of course, this is when I cut you off, Mr. Haddad. Up until November 20, 1987 the Court was not alerted ever that the United States seriously contended that Mr. Vance was a risk of flight or a threat to the community.

And, of course, you see, the problem, Mr. Haddad, is, I am not clairvoyant. It would be most helpful if I were. It is a useful tool for those people that are blessed with being clairvoyant. I could not anticipate it. To me, and in my view, the real question was whether or not this

appeal was just for the purpose of delay and there wasn't really any substantial issue that likely would result in a reversal.

Now, if anyone has read my two Opinions—Sometimes, and I can understand this; there are a lot of lawyers that don't even subscribe to the Federal Supplement. And if I were back

practicing law, I probably wouldn't be a subscriber either. There are so many Opinions that I write that are never read. Maybe fewer than that are read, but not understood. But I suppose that problem exists with many judges in the country.

But, if anyone should take the time in their leisure to read my pre-trial Opinion, to read my Opinion—I think it was close to 20 pages—overruling the Defendant's motion for new trial, even if read by candlelight, the reader would see that I wrestled mightily with these questions, these factual questions, the evidentiary questions, these questions as to whether or not the Defendant was deprived of a fair trial because of certain rulings, especially the, quote, "bad acts", end quote, evidence that I admitted under Rule 404(b) of the Federal Rules of Evidence.

And, of course, they could tell that, even though I concluded that the bad acts testimony was not prejudicial, that is, that I felt like the alibi and other things that came up in the case really led to Mr. Vance's conviction; still, of all the Rules of Evidence—now this is in the books—of all the Rules of Evidence, Rule 404(b) has generated more litigation than any other rule and has resulted in more reversals, especially in criminal trials.

So, at the hearing, I held that there was a substantial question, even though I felt like I was right in the way I interpreted the rules, I felt there was a substantial

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question, a panel in Cincinnati could well reverse the conviction.

There is one point that I want you to note, Mr. Haddad, and Mr. Arehart. In that Opinion it was my feeling, after being down in the trenches with this case, and, by that, I mean being there when it was tried, seeing and observing the Defendant, the chief prosecuting witness, Bonnie Kelly, and all of the other characters—and I do not mean that in a derogatory sense—the people that testified in the case, and after seeing and observing those, it was my idea, my impression, that, why in the world—and I stated this on the record several times—why in the world did Mr. Vance in his position do a thing like that?

In the Opinion I concluded, as did the jury, that—and this is in line with the White case, the White decision—was that Mr. Vance, that these people had leverage on Mr. Vance; that he was just caught in a position at that time and place where they had leverage on him. That is still my belief. And this is why I did not feel that he was a threat to the community.

As a matter of fact, if anyone in this courtroom should feel threatened, it would be me. I made the outrageous decisions that Mr. Haddad has enumerated throughout that led to Mr. Vance's unfair conviction, as he contends in the direct appeal. I am the person that came down on Mr. Vance

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with the maximum possible sentence of 15 years incarcerated sentence.

But, I can say right here and now, I don't feel threatened by the man. I have not been advised, and I assume that I surely have been advised by the United States Attorney or the Probation Office, that if—if Mr. Vance had been implicated, just implicated in any criminal activity

since his arraignment on January 18, 1987, that that would have been brought to my attention immediately.

The record should further reflect my thinking along these lines. And this is what I didn't do on November 20, 1987 because I was not alerted to what the United States contends now; is that I asked Mrs. Edelman a direct question, and she never answered it. I have gone back and reviewed the transcript of the proceedings.

I asked Mrs. Edelman this question; I said, "Mrs. Edelman, let me ask you a question." I said, "What if I remanded the Defendant to custody today; he took an appeal to the 6th Circuit Court of Appeals, languished in jail for a year-and-a-half, which is would take to perfect and prosecute this appeal, draws a panel of three that reverses the conviction because of this 404(b) evidence—and I think that's the thrust of your appeal—and then we come back and they order a new trial; and we come back and you are faced with trying him again without the 404(b) stuff and you say,